



2. Plaintiffs San Antonio Bay Estuarine Waterkeeper, Texas Campaign for the Environment, and S. Diane Wilson filed comments with TCEQ opposing Max Midstream's application. They identified serious flaws in the application that underestimated the expanded Terminal's capacity to pollute and asserted that draft air permit 162941 (the "Permit") published by TCEQ did not address these flaws. They asked for a contested case hearing to adjudicate these claims.
3. On April 8, 2022, TCEQ denied each Plaintiff's request for a contested case hearing and issued the Permit to Max Midstream. Plaintiffs appeal each of these actions.

#### **DISCOVERY PLAN AND CLAIM FOR RELIEF**

4. This case is an appeal of an action of an administrative agency that occurred outside the contested case process of Chapter 2001 of the Texas Government Code. Should it be necessary, discovery in this matter should be conducted under Level 3 of Texas Rule of Civil Procedure 190.4.

#### **PARTIES**

5. Plaintiff San Antonio Bay Estuarine Waterkeeper ("Waterkeeper") is an unincorporated association that is part of the national Waterkeeper organization. It is a membership organization whose mission is to protect Lavaca, Matagorda, and San Antonio Bays by investigating violations of environmental permits, participating in pollution permitting processes, and educating the public on the sources of pollution that impacts Calhoun County. Waterkeeper's address is 600 Ramona Rd., Seadrift, TX 77983.
6. Plaintiff Texas Campaign for the Environment ("TCE") is a nonprofit membership organization dedicated to informing and mobilizing Texans to protect their health, their community, and the environment. TCE works to promote strict enforcement of anti-

pollution laws designed to stop, or clean-up, air, water, and waste pollution. TCE's address is 3903 South Congress Avenue, Austin, TX 78704.

7. Plaintiff S. Diane Wilson is a retired fisherman and shrimper. She frequently recreates in Lavaca, Matagorda, and San Antonio Bays and has spent the majority of her life working to protect the ecosystems of these Bays from air, water, and waste pollution. Her address is 600 Ramona Rd., Seadrift, TX 77983.
8. Defendant Texas Commission on Environmental Quality is an agency of the State of Texas responsible for implementation of the Texas Clean Air Act, Ch. 382 of the Texas Health and Safety Code. Service on TCEQ may be obtained by serving its Executive Director at 12100 Park 35 Circle, Bldg. F, Austin, Texas 78753.

#### **JURISDICTION AND VENUE**

9. This is an administrative appeal of TCEQ's action under the Texas Clean Air Act. Jurisdiction lies with this Court pursuant to Texas Health and Safety Code § 382.032. This Court is the appropriate venue pursuant to Texas Health and Safety Code § 382.032.
10. Plaintiffs have exhausted all administrative remedies. Plaintiffs filed timely comments on the permit and requested a contested case hearing. After the Commission's decision to deny all contested case hearing requests and issue the Permit, Plaintiffs filed a motion for rehearing on May 3, 2022 pursuant to 30 Texas Administrative Code §§ 50.119(b)-(c), 55.211(f), 80.272.

#### **FACTUAL BACKGROUND**

11. On October 6, 2020, Max Midstream filed an application to obtain an air quality permit for the construction and operation of the expanded Terminal.

12. In its application, Max Midstream contended that emissions related to the Terminal, including volatile organic compounds (VOC), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), sulfur dioxide (SO<sub>2</sub>), hydrogen sulfide (H<sub>2</sub>S), particulate matter (PM), and greenhouse gases, would be below the major source thresholds. Based on these assertions, Max Midstream sought a minor new source review (NSR) permit, which has less rigorous application requirements than the Prevention of Significant Deterioration (PSD) permits required for major sources of air pollution.
13. Plaintiffs Diane Wilson and Waterkeeper submitted joint comments on the application on November 12, 2020 and June 4, 2021. Plaintiff TCE also submitted comments on June 4, 2021. On August 17, 2021, all three Plaintiffs submitted joint comments on the application and a declaration by Dr. Ranajit Sahu in support.
14. Plaintiffs' comments broadly asserted that Max Midstream had underestimated the Terminal's capacity to emit air pollutants and sought a sham permit to circumvent the more rigorous PSD permitting processes. Plaintiffs' comments specifically asserted that Max Midstream's application:
- a. failed to include information sufficient to demonstrate that emissions from the proposed new and modified facilities and activities meet all of the criteria established by Texas's federally approved preconstruction permitting rule at 30 Texas Administrative Code § 116.111(a)(2);
  - b. failed to demonstrate that monitoring, testing, and recordkeeping requirements proposed by the applicant are sufficient to measure emissions related to the proposed project and to ensure that the emission limits in the requested permit are practicably enforceable;

- c. relied on vendor specifications and engineering knowledge that is not included in the public application file to claim that its proposed emission rates will be achieved in practice across all operating scenarios that will be authorized by the requested permit, and failed altogether to demonstrate that the project will achieve the performance specified in the application;
- d. relied on inappropriate emission factors, including AP-42 emission factors and vendor guarantees that may or may not exist, which underrepresented potential and future actual emissions of VOC, NO<sub>x</sub>, CO, PM/PM10/PM2.5, SO<sub>2</sub>, and Hazardous Air Pollutants (HAPs) from the Terminal;
- e. underrepresented expected emissions from truck and marine loading and overestimated the collection efficiencies of its equipment related to these activities, and the Draft Permit fails to establish monitoring and testing conditions sufficient to make these representations practicably enforceable;
- f. failed to provide the basis for the crude characteristics it used to calculate proposed emission limits and to perform its air impacts demonstrations, and the Draft Permit fails to require monitoring sufficient to make representations regarding crude characteristics practically enforceable;
- g. failed to support the representation that its emergency flare will not emit any particulate matter, and the Draft Permit fails to establish monitoring and testing provisions that make the prohibition on all PM emissions from the emergency flare practically enforceable;
- h. was deficient because it does not demonstrate compliance with applicable major New Source Review requirements including federal Best Available Control

Technology (“BACT”) requirements, for CO, NOX, and VOC (ozone) because the project’s physical capacity to emit criteria pollutants above the applicable major source threshold is not sufficiently constrained by practicably enforceable emission limits and operating limitations;

- i. was submitted for a sham permit with the intention to circumvent the PSD preconstruction permitting requirements;
- j. failed to provide a reasonable basis for its representations regarding potential HAP emissions from the Terminal used to avoid major source HAP requirements and to model air quality impacts;
- k. did not demonstrate that emissions from the expanded Seahawk Terminal will not cause or contribute to violations of the National Ambient Air Quality Standards (NAAQS), including ozone NAAQS;
- l. improperly excluded secondary emissions from sources and proposed sources that are interconnected with the Terminal;
- m. proposed a leak detection and repair (“LDAR”) program that was not consistent with applicable Texas BACT requirements, because Max Midstream failed to consider more robust LDAR regimes required by recently issued Texas air permits, and because Max Midstream failed to consider whether additional monitoring using optical gas imaging (“OGI”) would provide more effective control without unreasonably increasing costs; and
- n. failed to demonstrate that a NOx emission rate of 0.1 lb/metric million British Thermal Unit (“MMBtu”) is consistent with applicable Texas BACT requirements for units CONT-1 and CONT-2.

15. In each submitted comment, Plaintiffs also requested a contested case hearing to adjudicate these issues.

16. On December 3, 2021, the TCEQ's Executive Director responded to public comment and maintained, *inter alia*, that a minor NSR permit was appropriate for the project.

17. On January 10, 2022, Plaintiffs submitted a supplement to their requests for contested case hearing. This supplement, along with the previously filed comments, contained the following facts to demonstrate Plaintiffs were "affected persons" entitled to a contested case hearing:

o. Plaintiff S. Diane Wilson, as an individual requester, and member of Waterkeeper:

- i. would suffer harms to her recreational and aesthetic interests in the Bays surrounding the terminal;
- ii. would suffer harms to her respiratory health from increased emissions at the Terminal because she routinely is within several hundred feet to 2 miles of the Terminal, observing the waters and shores of the surrounding Bays for pre-production plastics discharges from the Formosa facility to enforce a Consent Decree to which she is a part; and
- iii. would suffer harm to her respiratory health from increased emissions at the Terminal because four times each month she is 2-3 miles from the Terminal on the Formosa property to which she has a private right of access.

p. John and Janet Maresh, members of Plaintiff Waterkeeper:

- i. live 1.79 miles from the Terminal; and

- ii. would suffer from respiratory health, aesthetic, and recreational impacts from air emissions and industrial activity due to the proximity of their home from the Terminal.
- q. Curtis Miller, a member of Plaintiffs Waterkeeper and TCE:
  - i. suffers from asthma and other respiratory illnesses that require the care of a pulmonologist;
  - ii. will suffer harm to his respiratory health from increased emissions at the Terminal because he recreationally fishes approximately 2 miles from the facility and in nearby bays twice a month, and works 40-60 hours a week at his commercial seafood shop approximately 4 miles from the facility; and
  - iii. owns and operates a fleet of shrimping and oyster boats and would be economically harmed by increased air emissions from the Terminal that impact the habitability of the surrounding bays for shrimp and oysters, such as emissions of particulate matter which impacts the nutrient balance and carbon dioxide which harms oyster growth.
- r. And, Mauricio Blanco, a member of Plaintiffs Waterkeeper and TCE:
  - i. is a commercial oysterman and shrimper who works in the bays near the Terminal;
  - ii. would suffer harm to his respiratory health because of the proximity of his work to the Terminal; and
  - iii. would be economically harmed by increased air emissions from the Terminal that impact the habitability of surrounding bays for shrimp and

oysters, such as emissions of particulate matter which impacts the nutrient balance and carbon dioxide which harms oyster growth.

18. On March 7, 2022, TCEQ's Executive Director ("ED") filed his response to all hearing requests. The ED recommended that all of Plaintiffs' requests for a contested case hearing be denied because Plaintiff S. Diane Wilson and other members of Plaintiffs Waterkeeper and TCE resided or owned property too far from the Terminal to be impacted differently than the general public, and because the ED asserted that it could not confirm the location of several other members' homes.
19. On that same day, TCEQ's Office of Public Interest Counsel ("OPIC") also filed its response to all hearing requests. OPIC recommended that Plaintiff S. Diane Wilson's and Plaintiff TCE's requests for contested case hearing be denied because the distance of the residences of Plaintiff S. Diane Wilson and TCE's members to the Terminal was too far for them to have interests distinguishable from the general public. OPIC recommended that Plaintiff Waterkeeper's request for a contested case hearing be granted because of the proximity of the Mareshs' home to the Terminal and their concerns about health, recreational, and aesthetic impacts from the Terminal.
20. Max Midstream also filed a response to hearing requests which asserted that no hearing requests should be granted because TCEQ precedent dictates that only individuals with real property interests within a mile, or just slightly over a mile, are "affected persons" because only they have an interest separate from that of the general public. Max Midstream's response also included a declaration from a public health expert that asserted there would be no negative health impacts beyond a one-mile radius from the Terminal.

21. None of the responses to Plaintiffs' hearing requests disputed that Plaintiffs had met all procedural requirements to qualify for a contested case hearing, or that the purposes of Plaintiffs' Waterkeeper and TCE organizations were not germane to the permitting proceedings. The only disputed issue was whether Plaintiff S. Diane Wilson, or any other member of Plaintiff Waterkeeper or TCE, was an "affected person" who qualified for a contested case hearing in these permitting proceedings.
22. On March 21, 2022, Plaintiffs filed a reply to these responses to their hearing requests. The reply reasserted the same facts as those contained in prior comments. In addition, Petitioners' reply included a declaration by a public health expert asserting that based on Max Midstream's own application, there would be negative health impacts for all persons up to two miles from the Terminal and these impacts would be worse for people like Mr. Miller who already suffer respiratory health problems.
23. Plaintiffs' reply also contained a new declaration from Dr. Ranajit Sahu which stated that if the Terminal's full capacity to emit air pollutants was taken into consideration, harmful health impacts could extend as far as five miles from the Terminal.
24. Plaintiffs' reply also included a declaration from Mauricio Blanco, a member of Plaintiff Waterkeeper and TCE, demonstrating a private right to shrimp and oyster in Texas Bays granted by commercial licenses, and that he spends between one-and-a-half and four-and-a-half months per year working waters between 1.38 and 2.32 miles from the Terminal.
25. At its March 30, 2022 Commissioners' meeting, TCEQ announced that it would deny all requests for a contested case hearing, and would issue Permit number 162941 to Max Midstream with no modifications.

26. On April 8, 2022, that decision was memorialized in an order issuing the permit and denying all requests for a contested case hearing. The order did not provide any basis for denying Plaintiffs' requests for a contested case hearing or for issuing the minor NSR permit without modifications.

27. On May 3, 2022, Plaintiffs filed a motion for rehearing which is pending with TCEQ.

### **FIRST CAUSE OF ACTION**

#### **TCEQ Erred By Denying Plaintiffs' Requests for a Contested Case Hearing.**

28. All preceding paragraphs are incorporated by reference herein.

29. Members of the public have a right to seek a contested case hearing on the merits of a minor NSR permit. Tex. Health and Safety Code § 382.056(n); *see also* 30 Tex. Admin. Code § 55.201(i) (list of types of permits for which there is no right to a contested case hearing does not include minor NSR permits).

30. Plaintiffs' comments, requests for contested case hearing, and reply to responses for hearing requests demonstrate that Plaintiff S. Diane Wilson, and members of Plaintiffs Waterkeeper and TCE, have interests protected by the Federal Clean Air Act and Texas Clean Air Act that will be impacted by the issuance of this permit and there is a reasonable relationship between these interests and the permitting of the Terminal; and/or they will likely suffer negative health impacts as a result of the issuance of the permit; and/or they will suffer negative impacts on the use of their property as a result of the issuance of the permit; and/or they will suffer negative impacts on their use of natural resources as a result of the permits issuance; and they submitted timely comments that raised disputed issues on Max Midstream's application. Plaintiffs S. Diane Wilson,

Waterkeeper, and TCE are “affected persons” entitled to a contested case hearing. 30 Tex. Admin. Code § 55.203(c).

31. TCEQ applied the wrong legal standard and/or failed to consider required criteria in evaluating whether Plaintiffs are affected persons and acted arbitrarily and unreasonably in determining that Plaintiffs did not qualify as affected persons.
32. TCEQ’s denial of Plaintiffs’ requests for a contested case hearing was therefore invalid, arbitrary, and/or unreasonable. Tex. Health and Safety Code § 382.032(e).
33. Because TCEQ wrongly denied Plaintiffs’ request for a contested case hearing, TCEQ erred in approving a permit for which a challenge is pending.

## **SECOND CAUSE OF ACTION**

### **TCEQ Erred by Issuing Permit Number 162941 to Max Midstream Texas, LLC.**

34. All preceding paragraphs are incorporated by reference herein.
35. Max Midstream’s application for permit number 162941 does not comply with TCEQ regulations governing air permit applications and PSD permitting procedures. 30 Tex. Admin. Code §§ 116.111; 116.160. This is a violation of the Texas Clean Air Act. Tex. Health and Safety Code § 382.0515(2). Max Midstream’s application did not demonstrate it would use best available control technology and fails to demonstrate that the emissions from the Terminal will not contravene the purposes of the Texas Clean Air Act. Tex. Health and Safety Code § 382.0518.
36. TCEQ’s issuance of permit number 162941 to Max Midstream Texas, LLC is therefore invalid, arbitrary, and/or unreasonable. Tex. Health and Safety Code § 382.032(e).

## **PRAYER**

37. Plaintiffs S. Diane Wilson, Waterkeeper, and TCE respectfully request that the Court:

- a. Reverse TCEQ’s April 8, 2022 order based on a finding that Plaintiffs are “affected persons” entitled to a contested case hearing, and remand this case back to TCEQ for further proceedings with instructions to proceed in accordance with this Court’s findings and orders; or
- b. In the alternative, reverse TCEQ’s April 8, 2022 order based on a finding that the issuance of Permit number 162941 is in violation of the Texas Clean Air Act, and remand this case back to TCEQ for further proceedings with instructions to proceed in accordance with this Court’s findings or orders; and
- c. Grant any and all such further relief, general or special, at law or in equity, to which Plaintiffs may be justly entitled.

Respectfully Submitted,

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